

Original

NO. 36428-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BROWN,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
07 SEP 19 PM 1:10  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Anna M. Laurie, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel's failure to object to unfairly prejudicial propensity evidence denied appellant effective assistance of counsel.

Issue pertaining to assignment of error

Appellant was charged with delivering cocaine following three controlled buys. It was undisputed that money in appellant's possession when he was arrested was unrelated to the charged offenses. Nonetheless, the state introduced evidence that a narcotics canine detected the odor of controlled substances on the money and that the investigating officer believed the money was the proceeds of a drug sale. Where there is a reasonable probability this evidence of appellant's propensity to commit drug offenses affected the jury's verdict, did trial counsel's failure to object to the evidence constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On March 15, 2007, the Kitsap County Prosecuting Attorney charged appellant Richard Brown with delivery of cocaine. CP 1; RCW 69.50.401. The information was amended on May 8, 2007, adding two further counts of delivering cocaine and alleging that each offense

occurred within 1000 feet of a school bus route stop. CP 7-13; RCW 69.50.401; RCW 69.50.435(1).

The case proceeded to jury trial before the Honorable Anna M. Laurie. The jury acquitted Brown on Count I, entered a guilty verdict on Count II, and was unable to reach a unanimous verdict on Count III. CP 80. The jury also found that Count II was committed within 1000 feet of as school bus route stop. CP 81. The court imposed a standard range sentence of 90 months, and Brown filed this timely appeal. CP 90, 102.

## 2. Substantive Facts

Dawnell Skinner was the focus of a police investigation in which she sold crack cocaine to an undercover informant. She was given the opportunity to work off the drug charges by providing information to Special Operations Group Detective Martin Garland. Skinner worked with Garland for about nine months to avoid jail time. 2RP<sup>1</sup> 47.

On October 16, 2006, Skinner was told to set up a drug purchase from Richard Brown. Skinner was searched and given pre-recorded money to use in the transaction. 2RP 50-51. An undercover officer then drove her to a gas station where Brown and another man were waiting. 2RP 96-98. Skinner got in a car with the men, and they drove off. 2RP

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<sup>1</sup> The Verbatim Report of Proceedings is contained in five consecutively-paginated volumes from the jury trial (1RP—5/8/07; 2RP—5/9/07; 3RP—5/10/07; 4RP—5/14/07; 5RP—5/15/07) and a separate volume from the sentencing hearing (6RP—6/15/07).

101. The police had no control over the circumstances of the transaction from that point. Skinner was taken to a house the police did not know she would be going to, and no police were present when she was dropped off at her house. 2RP 84. Later that day, Garland met up with Skinner, who provided him with a quantity of crack cocaine consistent with the amount of money he had given her. 2RP 54-55.

Garland wanted Skinner to arrange another buy from Brown on October 25, 2006. Skinner reported, however, that Brown was uncomfortable selling her drugs again, although he was willing to sell to her roommate, Shirley Forgey. 2RP 59. Forgey was not an established informant, and while she had no pending charges to work off, she was willing to participate in the transaction so that Skinner would receive credit for the buy. Forgey wanted Skinner to move out of her home, and she knew Skinner would not be able to do so until she completed her contract with Garland. 2RP 58.

Garland went to Forgey's house, searched her, and provided her with pre-recorded buy money. 2RP 60. He and another detective then followed Forgey as she drove to the buy location. 2RP 61. Shortly after Forgey went inside an apartment, a vehicle registered to Brown arrived. 2RP 61-62. Brown and another man got out of the car and went inside the same apartment Forgey had entered. 2RP 62, 85. About a minute later,

Forgey came out of the apartment, got in her car, and drove back to her house. Garland met Forgey at her house, where she turned over a gram of crack cocaine. 2RP 62.

On January 9, 2007, Garland again asked Skinner to purchase drugs from Brown. 2RP 65-66. Garland and another officer went to Skinner's house, where they searched her and provided buy money. 2RP 2RP 67-68. A car with three people in it pulled up to the house, and the officers waited inside while Skinner went out to the car. 2RP 68, 86. About 90 seconds later Skinner returned and handed Garland crack cocaine. 2RP 68-69.

Brown was charged with three counts of delivering cocaine based on the three controlled buys. CP 7-13. The state could not locate Skinner for trial, and as a result it presented no first-hand evidence as to the first and third buys. 3RP 138; 4RP 178. The jury found Brown not guilty on the charge relating to the first buy and was unable to reach a verdict as to the charge relating to the third buy. CP 80.

Forgey testified at trial about the second alleged buy, but she could not remember the date of the transaction, she could not remember being searched, she could not remember the address she drove to, she could not remember if the police followed her, and she did not remember seeing the police while she was at the apartment. 4RP 164, 171. Forgey explained

that she had memory problems resulting from brain damage she suffered during surgery several years earlier. 4RP 172. She also admitted that she was using crack heavily during that time, although she could not remember if she had smoked any that day. 4RP 173-74.

It was undisputed at trial that none of the prerecorded buy money was recovered. 2RP 81. Brown did not have the buy money when he was arrested on March 14, 2007, more than two months after the third controlled buy, although police found \$750 in his shoes as he was being booked. 3RP 151, 153. The arresting officer testified that she called Garland when the money was found, and he directed her to have the money examined by a narcotics canine. 2RP 75; 3RP 153.

The officer who conducted the canine sniff testified that his dog was trained to alert to several different types of drugs, the dog had never given a false alert during his testing for certification, and the dog had never alerted to untainted currency. 2RP 113, 118. The officer testified that the dog alerted to the money taken from Brown, indicating that the money had recently been exposed to narcotics. 2RP 116-18, 122. Garland testified that as a result of the canine sniff, he believed the money was the proceeds of a narcotics sale. 2RP 75.

Defense counsel did not object to this testimony.

C. ARGUMENT

TRIAL COUNSEL'S FAILURE TO OBJECT TO UNFAIRLY  
PREJUDICIAL PROPENSITY EVIDENCE DENIED BROWN  
EFFECTIVE ASSISTANCE OF COUNSEL.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). Moreover, "tactical" or "strategic" decisions by defense counsel must still be reasonable decisions. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct.

1029, 145 L. Ed. 2d 985 (2000) (“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”).

Counsel’s failure to object to inadmissible or unduly prejudicial evidence may constitute deficient performance and deny a defendant effective representation. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001) (defense counsel did not move to suppress Rainey’s statement to the officer and the marijuana; there was no legitimate reason to not move for suppression and the suppression motion likely would have been granted; thus, counsel’s performance was deficient), review denied, 145 Wn.2d 1028 (2002); State v. Dawkins, 71 Wn. App. 902, 910, 863 P.2d 124 (1993).

In Dawkins, the defendant was charged with second degree child molestation. Although counsel discovered before trial that the state was aware of allegations of uncharged prior sexual misconduct with one of the victims, counsel did not move to exclude that evidence, believing it was admissible to show the defendant’s lustful disposition. Dawkins, 71 Wn. App. at 904. The prior misconduct evidence was admitted at trial without objection, and the defendant was convicted on the count relating to that victim. Id. at 905-06.

The trial court found counsel had been ineffective in failing to object to the prior misconduct evidence, and the Court of Appeals

affirmed. Although the evidence was relevant to show the defendant's lustful disposition toward the victim, the trial court concluded it would have ruled the evidence inadmissible because the danger of unfair prejudice outweighed its probative value. Id. at 909. Because the trial court had discretion to exclude the evidence in question, counsel's failure to seek exclusion constituted deficient performance. Id. at 910.

In this case, as in Dawkins, counsel's failure to object to inadmissible evidence constitutes deficient performance. Although there was no evidence establishing a connection between the money found in Brown's possession when he was arrested and the charged offenses, counsel failed to object when the state presented evidence that a canine sniff indicated that the money had recently been exposed to narcotics. Evidence of the canine sniff was irrelevant and should have been excluded.

Only relevant evidence is admissible. ER 402; State v. Harris, 97 Wn. App. 865, 868, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401. Even if relevant, evidence may be excluded if "its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ....” ER 403.

Brown was charged with delivering cocaine on three occasions. There was evidence that pre-recorded buy money was used in each of these alleged transactions. Officer Garland testified however, that since Brown was arrested more than two months after the last transaction, there was no reason to believe that any of the buy money would be found in his possession. 2RP 83. And in fact, none of that money was recovered. 2RP 81. There was no contention that the money found on Brown at the time of his arrest was related in any way to the charged offenses. Thus, there was no legitimate reason for the jury to hear that a police narcotics dog had detected an odor of controlled substances on that money. See State v. Bowman, 8 Wn. App. 148, 151, 504 P.2d 1148 (1972) (error for state to inject into the trial reference to drug evidence which had no bearing on crime with which defendant was charged).

The canine sniff evidence was relevant only to show Brown had a propensity to commit narcotics offenses. See State v. Herzog, 73 Wn. App. 34, 44, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994). But when evidence of uncharged crimes is relevant only to demonstrate the

defendant's criminal propensities, that evidence must be excluded. ER 404 (b)<sup>2</sup>; Herzog, 73 Wn. App. at 48-49.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes he is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of other crimes, wrongs, or acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court noted the reasoning underlying this rule in Herzog:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Herzog, 73 Wn. App. at 49 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)).

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<sup>2</sup> ER 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of other crimes is sometimes admitted under the res gestae exception to ER 404(b) to complete the story of the crimes being tried. State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), affirmed, 96 Wn.2d 591, 637 P.2d 961 (1981). Evidence is admissible under that exception, however, only if it is so connected in time, place, circumstances, or means employed that proof of the other misconduct is necessary for a complete description of the crime. State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991), affirmed, 120 Wn.2d 616, 845 P.2d 281 (1993). The evidence in this case showed there was no connection between the money in Brown's possession and the charged offenses. The canine sniff evidence was simply additional prejudicial information about Brown which shed no light on whether the charged crimes occurred, let alone how, where, or when. The res gestae exception therefore does not apply here, and it cannot explain or excuse counsel's failure to object.

Even if the state could have come up with some basis for arguing that the canine sniff evidence was relevant to a legitimate issue at trial had counsel objected, the trial court would have excluded the evidence as unduly prejudicial. Relevant evidence must still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951

(1986). In doubtful cases, the scale should be tipped in favor of the defendant and exclusion of the evidence. Smith, 106 Wn.2d at 776. Any probative value to evidence that an odor of narcotics was detected on money found in Brown's possession was far outweighed by the danger that the evidence would lead to a verdict based on Brown's propensity. It would therefore have been an abuse of discretion for the court to overrule an objection to that evidence, had counsel made one. See ER 403; State v. Trickler, 106 Wn. App. 727, 734, 25 P.3d 445 (2001) (abuse of discretion to allow jury to consider defendant's propensity to possess stolen property).

Counsel's failure to raise this basic objection to plainly prejudicial and plainly inadmissible testimony falls below the standard of reasonableness required of an attorney. And this unprofessional error prejudiced the defense, because there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

Had counsel objected to evidence regarding the canine sniff, that objection would have been granted, leaving the state with its scanty evidence relating directly to the alleged offense. Garland testified that

neither he nor any other officer observed Brown deliver cocaine to Forgey. 2RP 86. In fact, he was several hundred feet away, outside the apartment where the transaction allegedly took place. 2RP 85. He could not see what was happening inside the apartment, and Brown was not the only person present with Forgey. 2RP 85. Although Forgey testified she purchased cocaine from Brown, her memory was so full of holes due to brain damage and drug use that she could not even say where or when the transaction took place. 4RP 164-66, 172-74.

Because of counsel's unprofessional error, however, the prosecutor was able to focus the jury's attention on Brown's propensity to commit drug offenses, arguing that "the fact that [the dog] alerted on the ... large amount of money that was found in the defendant's shoes is just one more example of circumstances that show that the defendant had been around drugs." 4RP 216.

There is a tendency for the jury "to be unduly swayed by character, judging the person rather than the evidence in the case." Aronson, Robert H., *The Law of Evidence in Washington*, § 404-06 (3d ed. 1999). Moreover, "It cannot be doubted the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics ...." State v. LeFever, 102 Wn.2d 777, 783-84, 690 P.2d 574 (1984) (citations omitted),

overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

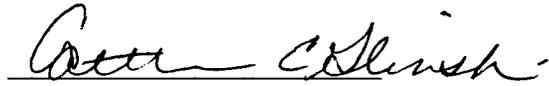
The main difference between the charges involving Skinner and the charge involving Forgey is that Forgey testified at trial. It would have taken a huge leap for the jury to convict Brown absent Skinner's testimony, and the jury refused to do so. But with Forgey's testimony, it took a smaller leap to overlook her significant credibility issues and find Brown guilty. There is a reasonable probability that evidence of Brown's propensity to commit drug offenses tipped the scales for the jury and resulted in the conviction. Trial counsel's failure to object to that evidence constitutes ineffective assistance of counsel, and Brown's conviction should be reversed.

D. CONCLUSION

Trial counsel's failure to object to irrelevant evidence regarding the canine sniff allowed the jury to convict Brown based on his criminal propensities rather than acquit him based on the lack of evidence as to the charged offense. Counsel's unprofessional error denied Brown effective representation, and his conviction must be reversed.

DATED this 18<sup>th</sup> day of September, 2007.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Richard Brown*, Cause No. 36428-0-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
September 18, 2007

FILED  
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DIVISION II  
07 SEP 19 PM 1:10  
STATE OF WASHINGTON  
BY Glinski  
DEPUTY